RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, 10-283

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In The
Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, PETITIONER,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL.

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, ET AL., PETITIONERS,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, PETITIONER,

v.

SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERVENOR RESPONDENTS IN NO. 09-958 AND *CALIFORNIA PHARMACISTS* RESPONDENTS IN NO. 09-1158

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QUESTION PRESENTED

Whether persons harmed by a state law may maintain an action in federal court to enjoin state officials from enforcing that law on the ground that it is preempted under the Supremacy Clause by federal law, namely 42 U.S.C. § 1396a(a)(30)(A).

CORPORATE DISCLOSURE

The non-individual respondents who file this brief have no parent corporations and no publicly held company owns any stock in these respondents.

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INTRODUCTION

Respondents established that they would experience immediate irreparable injury to their health and finances if petitioners, California state officials, were permitted to implement a state law requiring draconian cuts to the rates the state officials were paying medical service providers to provide health care to poor and disabled Californians.[1] The case comes to this Court on the premise—found by the courts below and not on review here—that the state law petitioners sought to implement conflicted with federal law, namely 42 U.S.C. § 1396a(a)(30)(A) (Section 30(A)).

Respondents sought and obtained injunctions from a federal court to stop these officials from implementing the state law that was preempted under the Supremacy Clause. This action is authorized by a

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[1] The intervenor respondents in No. 09-958 are the Sacramento Family Medical Clinics, Inc.; Theodore Mazer, M.D.; Ronald B. Mead, D.D.S.; and Acacia Adult Day Services. The plaintiffs in the so-called *California Pharmacists* action of No. 09-1158 are the California Hospital Association; California Association for Adult Day Services; Acacia Adult Day Services; Sharp Memorial Hospital; Grossmont Hospital Corporation; Sharp Chula Vista Medical Center; Sharp Coronado Hospital and Healthcare Center; Fe Garcia; Charles Gallagher; the California Pharmacists Association; California Medical Association; California Dental Association; South Sacramento Pharmacy; Farmacia Remedios, Inc.; and Marin Apothecary, Inc. d/b/a Ross Valley Pharmacy. As petitioners acknowledge (Pet. Br. iii n.1), the last six plaintiffs listed were named in the No. 09-1158 petition but were not parties in the court of appeals and thus are not respondents.

host of this Court's decisions, including such notable ones as *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), and *Ex parte Young*, 209 U.S. 123 (1908).

Petitioners and the United States each start their briefs with extensive arguments that Section 30(A) does not confer a "right" as that term has been interpreted for purposes of 42 U.S.C. § 1983. But whether there is such a Section 1983 "right" under Section 30(A) does not answer the question at issue here: whether respondents can seek relief in federal court to enjoin conduct by state officials that is preempted under the Supremacy Clause by federal law.

As to that question, there is no dispute by petitioners or their amici that, apart from Section 1983, this Court repeatedly has acknowledged and acted on its power to hear such claims. It is this cause of action that is the basis for these suits. Nothing in Section 1983 or its jurisprudence overrules or limits this other avenue of relief. Section 1983 serves a different purpose and provides different remedies.

The absence of the injunctive remedy sought here would severely undermine the Supremacy Clause and the liberty promoted by our federalism. This is particularly true in a case such as this where, even following federal agency disapproval of the rate cuts, the relevant federal agency has not successfully stopped petitioners from continued implementation of those cuts. Instead, those lower rates remain in

effect except to the extent barred by the federal court injunctions at issue here.

STATEMENT

A. Statutory Framework

1. Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (Medicaid Act), is a cooperative federal-state program that provides federal financial assistance to participating States to enable them to provide medical treatment for the poor, elderly, and disabled.

To receive federal funds, States are required to establish and administer their Medicaid programs through individual "State plans for medical assistance" approved by the federal Secretary of Health and Human Services (HHS). 42 U.S.C. § 1396a(a). The State must comply with the approved plan until it either withdraws from the program or HHS approves an amendment to the state plan. 42 C.F.R. § 430.20(b)(2).

When a state plan amendment is submitted to HHS, HHS has 90 days to make a determination whether the amendment complies with the Medicaid Act. 42 U.S.C. § 1396n(f)(2). If HHS does not act within this time frame, the state plan amendment is considered approved. *Ibid.* If however, HHS asks for more information from the State, HHS has a second 90-day time frame, beginning on the date the requested information is received from the State. *Ibid.*

The Medicaid Act provides specific requirements for state plans and reimbursement rates. Section 30(A), the provision at issue in this case, provides that a state plan

> must * * * provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

B. California's Challenged Conduct

1. California law authorizes the State to apply for federal financial assistance in Medicaid through a state program called Medi-Cal. *See* Cal. Welf. & Inst. Code §§ 14000.3, 14000.4, 14020. Medical service providers who participate in Medi-Cal must accept the Medi-Cal payment as payment-in-full, and will be subject to penalties if they require that patients pay anything beyond that amount. *See* Cal. Welf. & Inst. Code § 14019.4(a) & (c).

Before the various legislation leading to these civil actions, Medi-Cal payments per enrollee were

the nation's lowest for all enrollees. The Kaiser Family Foundation, *Medicaid Payments per Enrollee, FY2007,* http://www.statehealthfacts.org/comparetable.jsp?cat=4&ind=183. California's payments per enrollee in 2006 were less than 60% of the national average. *Ibid.* There had been no increase in most Medi-Cal payment rates since 2001. 09-958 Pet. App. 114a.

In 2008, the California Legislature enacted Assembly Bill X3 5 (AB 5). AB 5 added Section 14105.19 to the Welfare and Institutions Code, which instructed petitioner Director of the California Department of Health Care Services to cut rates under the Medi-Cal fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, clinics, and other providers by ten percent. 2009-2010 Cal. Stat., 4th Ex. Sess., c. 5, § 36.[2]

Assembly Bill 1183 (AB 1183) superseded those cuts by adding a new Section 14105.191 that required a five-percent cut for certain Medi-Cal fee-for-service payments and benefits, including adult day health care centers and certain hospital services, and a one percent rate reduction for all other fee-for-service benefits (including hospital outpatient services).

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[2] The Director (first Sandra Shewry, then David Maxwell-Jolly, now Toby Douglas) was sued by all respondents in the three certiorari petitions in which the Court granted review. Additional state officials were sued by only one set of plaintiffs in one of the other actions. Yet, for ease of reference, this brief generally refers to petitioners in the plural even when discussing solely the action brought by these respondents.

2008 Cal. Stat. c. 758, §§ 44, 45. Those cuts were repealed for a time in June 2011, but are now back in effect. 2011 Cal. Stat. c. 3, §§ 93.2, 93.5; 2011 Cal. Stat. c. 29, §§ 12, 13.

2. Although the AB 5 cuts were enacted in February 2008, with an effective date of July 1, 2008, California did not submit its proposed state plan amendments to HHS regarding any of the AB 5 cuts or most of the superseding AB 1183 cuts until September 30, 2008. 09-1158 Pet. 9.

On December 24, 2008, HHS requested that California provide additional information within 90 days, stating that the failure to do so could lead to disapproval. 09-1158 *California Pharmacists* Br. in Opp. 1a-20a. California did not respond. *Id.* at 23a. Twenty months after the State's response was due, HHS disapproved the state plan amendments. U.S. Cert. Amicus Br. 1a-4a.

Contrary to petitioners' claim (Pet. Br. 28), HHS did not rely on the existence of the injunctions as a basis for disapproving California's proposed amendments. Instead, HHS explained that it disapproved the proposed plan amendments because the State did not "provide information concerning the impact of the proposed reimbursement reductions on beneficiary access to services," "even though available national data indicate that this may be an issue for California," and did not respond to HHS's request for additional information. U.S. Cert. Amicus Br. 2a-3a.

HHS's additional ground for rejecting the plan amendments was based on the State's long delay in responding to HHS's request, not the existence of the injunctions. Petitioners' proposed amendments requested that the cuts, if approved, be effective retroactive to July 1, 2008. 09-958 Pet. App. 195a, 201a-202a. HHS explained that California's failure to respond raised concerns that "the cumulative effect of a retroactively effective approval of these reimbursement reductions would only serve to exacerbate access concerns." U.S. Cert. Amicus Br. 3a.

California has now sought reconsideration of that disapproval, U.S. Cert. Amicus Br. 5a-7a, which remains pending. Under 42 U.S.C. § 1316(c), HHS's decision to disapprove the proposed plan amendments are "not stayed pending reconsideration." Yet during this entire period—from the effective date of July 1, 2008, through the disapproval by HHS, and continuing to the present—petitioners have implemented the cuts, except when enjoined by federal courts.

C. Proceedings Below

1. No. 09-958

a. The original plaintiffs in the first action (the so-called *ILC* respondents) were Medi-Cal beneficiaries, associations composed of Medi-Cal beneficiaries, and pharmacies who served them. Additional plaintiffs (the intervenor respondents filing this brief) were permitted to intervene during the pendency of the case. Those intervenors are a physician, a dentist, a

medical clinic, and an adult day health care center also participating in the Medi-Cal program.[3]

The original plaintiffs sued petitioners in state court to prevent the implementation of AB 5. Petitioners removed the action from state to federal court. The district court denied the plaintiffs' motion for injunctive relief because Section 30(A) did not create any judicially enforceable "rights." The court of appeals reversed the district court and remanded for consideration of the merits of their motion for preliminary injunction. 09-958 Pet. App. 58a-93a. This Court denied petitioners' certiorari petition. *See* 129 S. Ct. 2828 (No. 08-1223).

b. On remand, the district court issued a preliminary injunction enjoining petitioners from implementing the AB 5 cuts with respect to doctors, dentists, prescription drugs, adult day health care centers, and clinics. 09-958 Pet. App. 94a-124a.

The district court found that respondents demonstrated a likelihood of success. 09-958 Pet. App. 100a-108a. The court found that the cuts would cause "pharmacies to cease selling [generic prescription] drugs to Medi-Cal patients and depriv[e] 'thousands, if not millions' of Medi-Cal beneficiaries of much-needed pharmaceuticals." *Id.* at 110a. It also found that pharmacies would "limit the scope of the

---

[3] Adult day health care centers provide an alternative to institutional care. Cal. Health & Safety Code § 1570.2.

services they provide to Medi-Cal beneficiaries, by, *inter alia*, discontinuing the provision of at least some prescription drugs * * *, turning away new Medi-Cal patients, or by laying-off pharmacy employees, and/or reducing pharmacy hours." *Id.* at 111a.

In addition, the court found that the rate reduction would cause doctors and other service providers (who had not received a rate increase since 2001) to "turn away" new Medi-Cal patients and either "stop treating [current] Medi-Cal patients, or, at a minimum, * * * reduce the services" provided to them. 09-958 Pet. App. 116a-117a. This reduction in services "increased the burden on emergency rooms and community health clinics" and forced some adult day health care centers to close. *Id.* at 117a-118a.

Weighing the balance of the hardships and the public interest, the district court concluded that the "significant threat to the health of Medi-Cal recipients" that "reducing payments to health-care service providers will likely cause" outweighed any expected fiscal savings. The district court noted such savings were unlikely to materialize because "many Medi-Cal beneficiaries will turn to more costly forms of medical care, such as emergency room care." 09-958 Pet. App. 121a-122a & n.14.

The district court issued a similar preliminary injunction for providers of non-emergency medical transportation services and providers of home health services in the Medi-Cal fee-for-service program. 09-958 Pet. App. 133a-153a. The district court found

that the cuts have "forced or will force [non-emergency medical transportation services] and home health services providers to reduce the geographic area they are able to serve, to decline to take new Medi-Cal patients, and, in some cases, to cease furnishing services to existing Medi-Cal patients" and to "close their business" altogether. *Id.* at 148a-149a. This curtailment of services had "already prevented altogether some Medi-Cal beneficiaries from obtaining needed [medical] services" and forced others to enter nursing homes. *Id.* at 150a-151a.

c. The court of appeals affirmed in part, reversed in part, and remanded. 09-958 Pet. App. 1a-38a, 54a-57a.

The court affirmed the district court's determination that respondents had established a likelihood of success on the merits on three independent grounds. 09-958 Pet. App. 10a-29a. First, "quite apart from any procedural requirements * * *, the State's decision to reduce Medi-Cal reimbursement rates based solely on state budgetary concerns violated federal law." *Id.* at 20a. Second, the court of appeals held that the rate cut was not the result of a "reasonable and sound" decision-making process and thus failed the interpretation of Section 30(A) urged by petitioners in that appeal. *Id.* at 22a n.12. Third, the court held that petitioners had not complied with the requirements of Section 30(A) as previously interpreted. *Id.* at 10a-12a (citing *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998)).

The court of appeals noted that "the cuts have apparently forced at least some providers to stop treating Medi-Cal beneficiaries." 09-958 Pet. App. 23a. In a separate unpublished opinion, the court of appeals also held that there was no clear error in the district court's conclusion "that the rate reductions would force—or, in some cases, were already forcing—[non-emergency medical transportation] and home health-care agencies to reduce the geographic area served, decline to take new Medi-Cal patients, or stop treating Medi-Cal patients altogether." *Id.* at 56a.

On respondents' cross-appeal, the court of appeals found that petitioners had waived their Eleventh Amendment immunity by removing the case from state to federal court. 09-958 Pet. App. 33a-37a. The court observed that California law creates a cause of action for mandamus which permits "monetary awards against a state agency or official resulting from unlawfully withheld health and welfare payments." *Id.* at 34a-35a (citing California cases). The court of appeals thus remanded with instructions that "the district court's injunction should extend to all services covered by that injunction and provided on or after" the cuts went into effect. *Id.* at 37a.

d. A month after the denial of petitioners' petition for rehearing en banc, petitioners asked the court to vacate its opinion and dismiss the appeals as moot because the challenged cuts of AB 5 were no longer in effect. The court of appeals rejected petitioners' motion. 09-958 Pet. App. 41a-51a. Petitioners have made all the required payments to respondents.

2. No. 09-1158

Meanwhile, the *California Pharmacists* respondents (including hospitals and adult day health care centers, associations representing those providers, and two individuals who receive Medi-Cal services) sued petitioners to prevent the implementation of AB 1183's five-percent/one-percent cuts.

a. The district court granted respondents' motion for a preliminary injunction as applied to adult day health care centers but not as to hospitals. 09-1158 Pet. App. 84a-105a. The district court found respondents had established irreparable injury to Medi-Cal beneficiaries due to the proposed cuts because they would be "at risk of losing access" to adult day health care services. *Id.* at 102a. That, in turn, created a "significant threat to the health of Medi-Cal recipients." *Id.* at 103a. The balance of hardships and public interest also weighed in favor of a preliminary injunction as to adult day health care centers, the district court found, because the proposed cuts might not save the State any money because "many Medi-Cal beneficiaries may turn to more costly forms of medical care, such as emergency room care." *Id.* at 103a n.7. The district court denied respondents' motion as applied to hospitals, however, on the ground that respondents had not established irreparable injury. *Id.* at 106a-127a.

b. The court of appeals affirmed the district court's entry of a preliminary injunction regarding the rate cut as applied to adult day health care

centers. 09-1158 Pet. App. 1a-36a. The court of appeals held that the district court did not commit clear error in finding that the legislature was concerned "solely with budgetary matters." *Id.* at 20a. Further, the court of appeals noted that petitioners "concede[ ] that here, the evidence indicates that at least some [providers] would stop treating beneficiaries due to AB 1183." *Id.* at 33a. The court of appeals reversed the district court's denial of a preliminary injunction regarding the cuts as applied to hospitals because the district court had abused its discretion in finding a lack of irreparable injury. *Id.* at 37a-41a.[4]

SUMMARY OF ARGUMENT

I.

A. Petitioners and their amici acknowledge that there is a federal equitable cause of action to enjoin state laws preempted under the Supremacy Clause. In this they are certainly correct. This Court has adjudicated on the merits dozens, and perhaps hundreds, of cases seeking injunctive relief against state officials based on the preemption of state laws by federal statutes.

To exclude the preemption suits here, petitioners improperly attempt to limit the scope of that equitable cause of action to suits brought in anticipation of

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[4] The lower courts did not reach respondents' alternative argument that the rate cuts were prohibited because they were implemented without approval from HHS. *See* 09-1158 Pet. App. 120a n.9; 09-55365 Resp. C.A. Br. 39.

some coercive suit by the State. But this Court's past private suits seeking injunctions based on preemption of state laws have encompassed situations in which there was no potential state court litigation. And no sound reason justifies limiting the federal cause of action solely to anticipatory actions.

Petitioners' rigid rule would create a system where federal courts would be open only when state courts also would be available to resolve the federal question as a defense. Under their view, federal courts would not be open when there is no state court available to address the federal question. But when a state court is not available, the need for a federal judicial forum is even more critical. Petitioners would leave the federal judiciary, including this Court, completely unavailable to protect the federal-state balance.

B. Congress ratified this equitable cause of action by enacting the Three-Judge Court Act, the Johnson Act, and the Tax Injunction Act. These laws reflect Congress's general acceptance of a federal cause of action to enjoin state officials from implementing preempted state laws, save with regard to specific substantive areas.

C. Section 1983 does not preclude these suits. That statute was enacted in 1871 to expand access to federal courts, not to displace existing causes of actions. Section 1983 is broader in its remedies than the equitable cause of action, and this Court has interpreted the word "rights" in Section 1983 as a

limitation. But nothing suggests that Congress intended to limit a federal court's authority to stop state officials from implementing preempted state laws. An "injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 114 (1989) (Kennedy, J., dissenting).

D. Nor is the term "right" some talismanic, trans-substantive requirement that always must be satisfied to obtain relief in federal court. The statutory bases for the power of federal courts to enjoin state officials from implementing preempted state laws—the jurisdictional statutes and the authority to grant injunctions and writs—simply do not limit jurisdiction to those who can show the deprivation of a "right."

The implied cause of action cases, such as *Cort v. Ash*, 422 U.S. 66 (1975), usually involve a damages claim under a particular federal statute against *private* parties. Those cases do not implicate the federal-state balance and are not apposite because the Supremacy Clause governs directly only parties acting under color of law in their official capacities. Thus, a federal suit to enjoin implementation of preempted state laws runs only against parties like petitioners here.

II.

A. Medicaid, like other federal statutes enacted pursuant to the Spending Clause, preempts conflicting state laws. That such statutes ultimately involve a State's "voluntary agreement" to participate in the federal program does not alter their preemptive effect, just as it does not alter the status of similar Commerce Clause statutes. Indeed, federal laws would be continually frustrated if public entities that accepted federal money (or federal regulatory authority) could rely on state law as an excuse for not complying with federal law.

B. This Court has thrice rejected the argument that the structure of Medicaid (or similar Spending Clause statutes) reflects any congressional intent to preclude federal courts' authority to enjoin implementation of preempted state laws. Most importantly, nothing in the statute or regulations permits private parties to trigger an administrative review to ensure that a recipient complies with federal law. Thus, this case has none of the statutory protections for individuals that this Court found material in *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011).

Furthermore, the federal Department of Health and Human Services lacks effective tools to timely address rate cuts or other reductions in services. All HHS can do is threaten to withhold all federal funding from the Medi-Cal program. But even if it ultimately were to do so (perhaps many years after cuts were implemented), that would injure the very

beneficiaries the Medicaid program is designed to assist and protect. These cases are perfect examples of HHS's impotence. Petitioners implemented the proposed rate cuts months before they even submitted them to HHS for approval. And despite HHS's ultimate disapproval of the cuts (almost three years after they were enacted and more than two years after they were submitted for review), petitioners nevertheless continue to pay the unapproved lower rates to providers, except where federal courts have enjoined them from doing so.

C. Likewise, Congress did not preclude private enforcement of Section 30(A)'s preemptive effect. Section 30(A) has substantive content that is well within the judicial ken, and Congress expected private litigation over compliance with Section 30(A). Petitioners point to the repeal of the Boren Amendment. But when Congress repealed that provision, it refused to repeal Section 30(A) or to limit private enforcement of Medicaid.

III.

Petitioners concede that they waived any argument that respondent beneficiaries lack prudential standing. But they also waived the argument they belatedly press here as to respondent providers, as they did not press it in either the court of appeals or in their certiorari petitions.

In any event, respondents possess prudential standing. Just as a person has prudential standing to argue that "[t]he public policy of [a State], enacted in

its capacity as sovereign, has been displaced by that of the National Government," *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011), a person has prudential standing to argue that a law enacted by a State has been displaced by the National Government.

Further, to the extent relevant, Section 30(A) itself was enacted to ensure that beneficiaries received medical services by creating sufficient incentives for doctors and other providers to offer services to Medicaid patients. As beneficiaries of medical services and the providers of those services, respondents have interests in the amount providers are paid that are, at the very least, arguably protected by the statute. Indeed, the facts of these cases show that the rate cuts would have a significant and immediate detrimental impact on both beneficiaries and providers.

ARGUMENT

The federal courts long have granted private persons injunctions and writs when government officials at the state and federal levels act outside the scope of their legitimate authority. The authority of such officials is limited not just by the prohibitions of the Constitution itself, but by all valid federal laws, which the Constitution provides "shall be the Supreme Law of the Land." U.S. Const. Art. VI, cl. 2. A state official who acts in violation of a federal statute is in the same position as a state official who acts in violation of the Constitution. Both have upset the "constitutional balance between the National Government and the States" established by the Supremacy

Clause. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

In both cases, the officials have exceeded their state authority and are stripped of any immunities. And in both cases, federal courts must be available to grant injunctions and writs to prevent irreparable injury to persons concretely injured by those violations. Such a cause of action exists apart from 42 U.S.C. § 1983 or any express or implied cause of action under a particular federal statute.

I. THE ACKNOWLEDGED AND LONGSTANDING EQUITABLE CAUSE OF ACTION TO KEEP GOVERNMENT OFFICIALS WITHIN THE SCOPE OF THEIR AUTHORITY INCLUDES SUITS BY INJURED INDIVIDUALS TO ENJOIN IMPLEMENTATION OF STATE LAWS THAT CONFLICT WITH FEDERAL LAW

Petitioners and their amici rightly acknowledge that there is a federal equitable cause of action to enjoin state laws preempted under the Supremacy Clause. Petitioners acknowledge that, even absent any express cause of action a person may be "a plaintiff in a lawsuit filed to forestall future state (or local) enforcement of state (or local) regulation of the party's conduct." Pet. Br. 43.

The United States as amicus likewise agrees that there is a "nonstatutory cause of action to enjoin enforcement of state action that is inconsistent with federal law." U.S. Br. 20. It describes this cause of

action as "well established," having "considerable historical grounding" and observes that it "serves an important purpose in vindicating the supremacy of federal law." U.S. Br. 21 & n.7.

The National Governors Association also agrees that it is "now largely uncontroversial" that persons may "obtain relief in form of a writ of injunction or prohibition" from a federal court "against the enforcement of a pre-empted State law." NGA Br. 23-24.

They are all correct to acknowledge that this federal equitable cause of action exists, and yet they improperly attempt to limit its scope. To do so, they borrow from inapposite case law that is tied to particular statutory text and motivated primarily by concerns regarding damages relief that are inapplicable to this cause of action.

A. A Cause Of Action To Enjoin State Officials From Implementing Preempted State Laws Has Been Recognized By This Court For Almost Two Centuries

1. Individuals harmed by state officials' implementation of preempted state laws have a federal cause of action to enjoin such conduct

a. From its earliest era, this Court has held that a federal court that has subject-matter jurisdiction may grant an injunction or writ at the behest of an individual who has standing to bring a government official into compliance with federal law. *See Osborn v. Bank of the United States*, 22 U.S. 738

(1824). "The federal courts of the early nineteenth century had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes * * * " *Swift & Co. v. Wickham*, 382 U.S. 111, 117 (1965). That practice increased after Congress gave federal courts arising-under-federal-law subject-matter jurisdiction in 1875. *See ibid.*

Ex parte Young, 209 U.S. 123 (1908), is a significant example of this cause of action. Contrary to petitioners' claim (Pet. Br. 41), that decision was not limited "only" to the question whether the Eleventh Amendment barred the grant of an injunction. In that case, complete diversity between the parties was lacking, *id.* at 143, and the Court thus also held that the federal courts had subject-matter jurisdiction to hear the claim under its federal-question jurisdiction. *Id.* at 145 ("We conclude that the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.").

Given the well-pleaded complaint rule and general rule that a "suit arises under the law that creates the cause of action," *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), this holding has been understood by leading judges and commentators alike as recognizing a federal cause of action to enjoin state officials who come into conflict with the Constitution or federal laws. *See, e.g.*, *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 332-334 (5th Cir. 2005) (Higginbotham,

J.); *Crawford-El v. Britton*, 93 F.3d 813, 831-832 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring), rev'd on other grounds, 523 U.S. 574 (1998); Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 903 (5th ed. 2003); 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566 (3d ed. 2008).

Indeed, this Court recently relied on *Ex parte Young* to rebut the United States's view that no cause of action existed to challenge federal legislation as unconstitutional under separation-of-powers principles. The Court held that equitable relief against both state *and* federal officials "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)); *see also Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995) (Alito, J.).

b. This cause of action against state officials includes enforcement of the Supremacy Clause's preemptive effect on state laws that conflict with federal laws. That is because, first, preemption claims are constitutional claims. *See Brown v. Hotel & Rest. Emps. Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (preemption occurs "by direct operation of the Supremacy Clause"); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 271-272 (1977) (noting that preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause");

City of Phila. v. New Jersey, 430 U.S. 141, 142 (1977) ("federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause"); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution").

There is no basis why this constitutional claim "should be treated differently than every other constitutional claim" in terms of private enforcement. *Free Enterprise Fund*, 130 S. Ct. at 3151 n.2 (rejecting that argument as to separation-of-powers claim). To the contrary, the Supremacy Clause vindicates individual liberty through the so-called "vertical" separation of powers by limiting encroachment by the States on the national power and vice-versa. *See Bond*, 131 S. Ct. at 2364 (analogizing separation-of-powers and federalism principles). This Court thus recently confirmed that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Ibid.*

In addition, this Court already has permitted federal courts to exercise the same authority respondents invoke here to bring *federal* executive officials into compliance with federal law. Under the doctrine of "non-statutory review," this Court has recognized a federal equitable cause of action based on federal-question jurisdiction and the federal

courts' equity and writ authority. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 n.12 (1969-1970). Thus, even in the absence of an express cause of action or a statute like the Administrative Procedure Act (APA), if "an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *see also Dalton v. Specter*, 511 U.S. 462, 474 (1994) ("some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA"); *Harmon v. Brucker*, 355 U.S. 579, 581-582 (1958) ("[g]enerally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 142-143 (1967) (describing understanding of Congress in the 1930's regarding existence of "traditional channels of review" of federal executive action); Scalia, *supra*, at 913-916 (collecting cases in postal, public lands, and taxing areas).

For example, in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), the court of appeals examined the lawfulness of a federal Executive Order providing that federal contractors would be debarred from bidding on future government contracts if they permanently replaced striking workers. The plaintiffs claimed the Order was contrary to federal statutes. The court, through Judge Silberman, concluded

that the APA's statutory cause of action did not apply. It nonetheless held that as long as the federal court has subject-matter jurisdiction, "we have never held that a lack of a statutory cause of action is per se a bar to judicial review." *Id.* at 1328. *Accord Trudeau v. FTC*, 456 F.3d 178, 189-190 (D.C. Cir. 2006) (Garland, J.) ("'judicial review is available when an agency acts ultra vires,' even if a statutory cause of action is lacking").

Non-statutory review, like the equitable cause of action at issue in this case, reflects the undisputed role that federal courts have played, apart from any express cause of action, in ensuring that executive officials do not exceed the bounds of federal law.

c. Consonant with *Osborn*, *Ex parte Young*, and the non-statutory review cases, this Court has adjudicated on the merits dozens, and perhaps hundreds, of cases seeking injunctive relief against state officials based on the preemption of state laws by federal statutes. *See* Br. of *Dominguez* Resp. Appendix (listing such cases). To be sure, the Court's decisions generally were silent as to the cause of action. Even so, those decisions "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809) (Marshall, C.J.). And at least some members of this Court have opined that plaintiffs may "vindicate" some types of "preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State Transit*

Corp. v. City of Los Angeles, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting).

d. Moreover, this Court repeatedly has held that there is federal-question jurisdiction over suits brought against state officials seeking such injunctive relief. For example, in *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), Verizon sought "relief from the [state] Commission's order 'on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail.'" *Id.* at 642 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)). This Court held that Verizon's claim "'thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.'" *Ibid.*

Although federal court jurisdiction can be established with only a colorable (as opposed to actual) federal cause of action, *see ibid.*, it would be quite surprising more than a century after *Ex parte Young* to discover that in fact there is no cause of action to adjudicate such preemption suits. That is why the United States in *Verizon* relied on *Shaw* to expressly urge that Verizon had "a claim for equitable relief under the Supremacy Clause and the federal jurisdictional statutes on the ground that an Act of Congress preempts a state regulatory action." U.S. Reply Br., *Verizon Md. Inc. v. Public Serv. Comm'n*, Nos. 00-1531, 00-1711, at 8 (Nov. 2001).

2. *The scope of the equitable cause of action includes all persons injured by preempted state laws, and is not limited to claims that merely raise defenses anticipatorily*

This federal equitable cause of action allows anyone harmed by implementation of a preempted state law to obtain injunctive relief. Petitioners thus are wrong to assert (Pet. Br. 43-44) that the federal equitable cause of action, which they ultimately acknowledge exists, is limited to suits brought in anticipation of some coercive suit by the State. But even if it were, this suit fits squarely in that model. California provides that those who participate in Medi-Cal will be penalized monetarily if they charge a patient any money other than the rate set by petitioners. *See* Cal. Welf. & Inst. Code § 14019.4(a) & (c); *see also id.* § 14123(a) (provider also may be suspended from Medi-Cal for violating any statutory provision). The validity of the rate set by petitioners (and whether that rate is preempted) thus could be addressed as part of an action the State could bring against the provider respondents.

In any event, the equitable cause of action is not so limited. One of petitioners' amicus asserts that "every case in which this Court has upheld relief based on federal supremacy" has met that requirement. NGA Br. 25. But as the United States noted at the certiorari stage, "not all of this Court's cases necessarily fit that description." U.S. Cert. Amicus Br. 18. To the contrary, this Court's cases also have

encompassed situations in which the State does not seek to regulate a party directly, but still acts with respect to that party in a way preempted by federal law.

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000), is one of those situations. In that case, the State maintained a list of companies with which it would not do business, including companies that did business with Burma. There was no formal process before a company was placed on the State's list; the only available challenge by a company to inclusion on the list was submission of an affidavit stating that it did no business in Burma. *Id.* at 368 n.2. There was no judicial or administrative action that the State could, or needed to, bring against the listed companies. This Court nonetheless permitted companies to bring a successful suit for injunctive relief claiming preemption of that state law.

Indeed, the United States pointed to *Crosby* in its certiorari-stage brief as evidence that the cause of action extended beyond anticipation of a coercive suit by the State. U.S. Cert. Amicus Br. 18. Now, however, it contends that the law in *Crosby* was an "exercise of the State's authority to impose and enforce what were essentially state regulatory standards." U.S. Br. 23 n.8. But the state law was only "regulatory" in the sense that it used the State's spending power, instead of its police power, to achieve its goals. The same is true here. California wants medical providers to provide services to people at a fixed price, so it allows participation in its Medi-Cal program only

to those who will accept the rates it pays and will not charge the patient any additional money.

Moreover, *Crosby* is hardly an outlier. This Court has addressed other preemption claims where the state law could not result in any form of judicial proceedings in which the plaintiff could raise preemption as a defense. *See Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (State refused to buy drugs from a company under Medicaid unless the company gave the State a rebate); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (State refused to pay for certain medical services required by Medicaid); *Perez v. Campbell*, 402 U.S. 637 (1971) (State automatically suspended driver's license of a person who failed to pay a judgment discharged under Bankruptcy Act); *see also Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (finding state regulation governing private parties' purchasing decisions preempted; leaving for remand the question whether state regulation governing its own purchase decisions also was preempted); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. Am., Inc.*, 519 U.S. 316 (1997) (after state agency ordered contractor to withhold certain payments from subcontractor, subcontractor sued state agency arguing that state agency's order to contractor was preempted by ERISA).

While these repeated decisions do not squarely hold that the federal equitable cause of action extends to these preemption suits, preemption suits of this

type are a consistent portion of the federal courts' docket. And this Court regularly reviews them without question. It would be surprising to learn that none of these cases should have been heard in federal court.

Petitioners' amici, who like petitioners admit such a federal cause of action exists, assert that the history of equity limits such actions to "negative injunctive relief" for those who have "a legal defense (such as pre-emption) to an impending legal action." NGA Br. 25-26. But the injunctions in these cases are negative injunctions—they simply prohibit the state officials from implementing a cut in existing rates. Further, equity causes of action were not limited solely to anticipatory legal defenses. *See* Br. of *Dominguez* Resp. 12-13, 40-42. And even if they had been, the "'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.'" *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010). There is no sound reason today to limit the federal cause of action solely to anticipatory actions. *Cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (determining whether an existing cause of action extends to certain conduct does not require the same inquiry as whether cause of action exists in first instance).

The rigid rule proposed by petitioners and their amici for cabining the existing cause of action is particularly unwarranted. They ask this Court to

create a system where federal courts would be open only when state courts would also be available to resolve the federal question as a defense. Under their view, however, federal courts would not be open when there is no state court available to address the federal question. But when a state court is not available, the need for a federal judicial forum is even more critical. Petitioners would leave the federal judiciary, including this Court, completely unavailable to protect the federal-state balance.

B. Congress Has Ratified The Existing Equitable Cause Of Action To Enjoin Conduct Implementing Preempted State Laws By Enacting Specific Federal Laws That Address It, Rather Than Abolish It

In light of a growing number of federal court challenges to state legislation, Congress considered at the beginning of the Twentieth Century a variety of responses to the authority of federal courts to enjoin state officials. Congress ultimately adopted two narrow approaches that signaled its general acceptance of the federal cause of action to enjoin state officials who were implementing state laws contrary to the Constitution and laws of the United States.

1. Shortly after this Court's decision in *Ex parte Young*, the House of Representatives passed a bill that would have amended what is now Section 1331 to deprive district courts of jurisdiction over actions "to suspend, enjoin, or restrain the action of any officer of a State in the enforcement, operation, or

execution of a statute of such State, upon the ground of the unconstitutionality of such statute." 46 Cong. Rec. 3998, 4001 (1911) (reprinting conference report).

The Conference Committee struck that provision, however, and substituted a provision requiring a three-judge court to convene to enter such an injunction and for an appeal to be available directly to this Court. *Id.* at 4001-4002. Congress enacted that substitute. *See* Judicial Code of 1911, ch. 231, § 266, 36 Stat. 1087, 1162 (codified as amended at 28 U.S.C. § 2281 before its repeal by Pub. L. No. 94-381, § 1, 90 Stat. 1119, 1119 (1976)). That statute reflected Congress's judgment that although federal courts should have the power to enjoin state officials from implementing state statutes, the decision should not rest in the hand of a single district court judge. *See Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 77 (1960) (describing three-judge court provision as "cushioning the impact of the *Young* case").

For the first 15 years after its enactment, in about 10% of the cases heard by this Court under this provision, the "state regulation was alleged to be precluded by or to conflict with some existing and controlling federal law." Welch Pogue, *State Determination of State Law and the Judicial Code*, 41 Harv. L. Rev. 623, 632 & n.41 (1927-1928); *see also Michigan Cent. R.R. v. Michigan Pub. Util. Comm'n*, 271 F. 319 (E.D. Mich. 1921) (three-judge court) (holding Supremacy Clause claim triggered requirement for three-judge court). Justice Frankfurter, writing for the Court, held that "[n]either the language of

§ 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281." *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 156 (1962).

Although this Court in 1965 ultimately reversed course and held that the three-judge court provisions did not apply to Supremacy Clause challenges, *see Swift & Co. v. Wickham*, 382 U.S. 111 (1965), it did so with heavy reliance on judicial administration (i.e., concern regarding numerous three-judge court actions with mandatory appeal to this Court). *Id.* at 128-129. No suggestion was made that Congress was not aware of preemption challenges when it enacted the three-judge court provisions or that it disapproved of them in any way. Instead, this Court concluded that actions claiming preemption would not have been as troubling to Congress as substantive due process cases. That was so, the Court reasoned, because "single-judge decisions in conflict and preemption cases were always subject to the corrective power of Congress." *Id.* at 127.

2. After several years of experience with the three-judge court provision, some members of Congress renewed efforts to establish broad limits on federal court jurisdiction over injunctive suits against state officials. *See* Note, *Limitation of the Jurisdiction of the Federal District Courts in Public Utility Rate Litigation*, 20 Iowa L. Rev. 128, 133 (1934-1935) (collecting proposed bills). Instead of removing such

jurisdiction generally, however, Congress channeled the power of the federal courts to enjoin state officials with regard to certain substantive areas. In doing so, it reaffirmed the availability of the equitable cause of action in all other areas.

The Johnson Act of 1934, ch. 283, § 1, 48 Stat. 775 (codified at 28 U.S.C. § 1342), for example, expressly carved out actions claiming preemption from its exclusion of federal court jurisdiction. That statute provides that a district court "shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency" so long as a "plain, speedy and efficient remedy may be had in the court of such State." Additional language in the Johnson Act excludes preemption claims from its scope, however, by exempting orders that "interfere with interstate commerce." *See Public Utils. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469-470 (1943) (holding that the Johnson Act did not bar federal injunction against preempted state order). Thus, the Johnson Act continues to permit preemption claims to be brought in federal court even though other federal constitutional claims are channeled to state court. *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1186 (3d Cir.) (collecting modern cases), cert. denied, 516 U.S. 815 (1996).

The fine-tuned language in the Johnson Act contrasts with the Tax Injunction Act (TIA), enacted three years later. *See* Act of Aug. 21, 1937, ch. 726,

§ 1, 50 Stat. 738 (codified at 28 U.S.C. § 1341). "The language of the TIA differs significantly from that of the Johnson Act." *Hibbs v. Winn*, 542 U.S. 88, 105 n.7 (2004). Unlike the Johnson Act, Congress provided no exceptions in the TIA to a broad divestiture of district court jurisdiction regarding tax collection in deference to state courts. This broader language made clear that Congress did not intend to permit federal courts to entertain preemption claims regarding state taxes so long as there was "a plain, speedy and efficient remedy" in state courts. *See Ashton v. Cory*, 780 F.2d 816, 821-824 (9th Cir. 1986) (Kennedy, J.).

Thus, although Congress's approach to federal jurisdiction varied on certain occasions for certain types of claims, the various statutes together reflect Congress's general acceptance of a cause of action to enjoin state officials from implementing preempted state laws in those circumstances where it did not expressly remove federal court jurisdiction.

C. Section 1983 Was Not Intended To Limit This Distinct Cause Of Action

Petitioners rely heavily on the case law developed by this Court under 42 U.S.C. § 1983, and argue that the rules adopted by this Court to determine whether a statute secures "rights" should dictate the limits of a federal court's authority to stop state officials from implementing preempted state laws. Pet. Br. 21-23. But nothing suggests that Congress intended those limits to be imported into this distinct cause of action. "Despite what one might think from

the increase of litigation under the statute in recent years, § 1983 does not provide the exclusive relief that the federal courts have to offer." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting).

a. In the last quarter of the Nineteenth Century, this Court recognized that the two causes of action were distinct and that just because an action could not be brought under Section 1983 did not exclude all federal relief. Thus, even though the Court held in *Carter v. Greenhow*, 114 U.S. 317 (1885), that the Contracts Clause did not secure rights enforceable through Section 1983, it noted that Congress "has legislated in aid of the rights secured by that clause of the Constitution * * * by conferring jurisdiction upon the [lower federal] courts * * * of all cases arising under the constitution and laws of the United States, where the sum or value in dispute exceeds $500." *Id.* at 322-323. And on the same day, it expressly permitted a case under the Contracts Clause to proceed under the arising-under-federal-law statute. *See White v. Greenhow*, 114 U.S. 307, 308 (1885).

This Court later explained that even though a suit could not be brought under Section 1983, "[i]f state legislation impairs the obligations of a contract, or deprives of property without due process of law, or denies the equal protection of the laws * * * remedies are found in [the predecessor to Section 1331], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States." *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900). Although the statutory provision cited by the

Court was a jurisdictional one, the *Holt* Court understood such a jurisdictional grant to confer the equitable power to enjoin government officials from exceeding their lawful authority. *Holt* was issued at the same time *Ex parte Young* and non-statutory review cases were cementing into the case law that already-longstanding equitable cause of action.

b. These holdings are consistent with the purposes underlying Section 1983. Section 1983 was enacted in 1871 to expand access to federal courts, not to displace existing causes of actions. Indeed, the legislative history reflects that Congress intended Section 1983 to go beyond the cause of action already available under the "power-allocating provisions" of the Constitution. *Dennis v. Higgins*, 498 U.S. 439, 455 (1991) (Kennedy, J., dissenting).

Thus one of the bill's sponsors, Representative Shellabarger, explained that existing, pre-Fourteenth Amendment constitutional "prohibitions upon the [police] powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers." *Ibid.* (quoting Cong. Globe, 42d Cong., 1st Sess., App. 69-70 (1871)). Similarly, Senator Thurman, an opponent of the bill, explained that "in respect to this class of provisions, which are limitations upon the powers of the States," they already were "protected through the Federal judiciary." Cong. Globe, 42d Cong., 1st Sess., App. 221 (1871).

c. Section 1983's remedies are much broader than those available under this federal equitable cause of action. Section 1983 authorizes damages (including punitive damages) against officials in their individual capacities. *See Smith v. Wade*, 461 U.S. 30 (1983). In addition, federal courts have broader injunctive authority under Section 1983 than under other causes of action because Section 1983 is an express exception to the Anti-Injunction Act's prohibition against enjoining state court proceedings. *See Mitchum v. Foster*, 407 U.S. 225 (1972). And (since 1976), prevailing plaintiffs can recover attorneys' fees against officials in both their individual and official capacities. 42 U.S.C. § 1988(b); *Hutto v. Finney*, 437 U.S. 678 (1978).

Section 1983 also, for a substantial period of time, provided for broader jurisdiction for federal courts than was otherwise generally available to seek injunctive relief against state officials. Congress granted federal courts jurisdiction over Section 1983 actions without regard to the amount in controversy. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). At the time of Section 1983's enactment, federal courts did not possess general arising-under-federal-law jurisdiction. Even when Section 1331's predecessor authorized general federal question jurisdiction, it contained an amount-in-controversy requirement (equal to that of diversity) until 1980. *See Hart and Wechsler's*, *supra*, 1473. That amount was "impossible to meet" for many beneficiaries challenging state welfare laws as preempted.

Hagans, 415 U.S. at 552-553 (Rehnquist, J., dissenting). That jurisdictional barrier was one of several reasons litigants sought to have their claims fit within the scope of Section 1983, rather than simply press them under the equitable cause of action.

Thus, given their distinct histories and distinct remedies, there is no reason to think that Congress intended Section 1983 to limit the equitable cause of action invoked by respondents here. Instead, this cause of action is a longstanding, albeit bare bones, action needed to ensure that persons can seek injunctive relief in federal court to prohibit injuries caused by state efforts to enforce preempted state laws. "The injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Golden State*, 493 U.S. at 114 (Kennedy, J., dissenting).

D. Respondents Do Not Need A "Right" In Order To Fall Within The Existing Equitable Cause Of Action

Contrary to petitioners' view (Pet. Br. 22-26, 41-43), the term "right" is not some talismanic, transsubstantive requirement that always must be satisfied to obtain relief in federal court. This Court has held that the word "rights" in Section 1983 is a term of limitation in that particular statute. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("it is only violations of *rights*, not laws, which give rise to § 1983 actions"). By contrast, Section 1331 and the other

statutory bases for the federal courts' power to enjoin state officials from implementing preempted state laws simply "do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting).

Further, the Court has held in *Gonzaga*, 536 U.S. at 283, that "the determination of whether a statute confers rights enforceable under § 1983" should be "guide[d]" by the Court's "implied right of action cases" such as *Cort v. Ash*, 422 U.S. 66 (1975). Those cases also require the existence of a "right." But they usually involve a damages claim under a particular federal statute against *private* parties. *See* Br. of *Dominguez* Resp. 35-36 n.17. This case does not involve private defendants.[5]

The Supremacy Clause, by contrast, directly governs only parties acting under color of law. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229 (1983). Likewise, the federal equitable

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[5] On occasion, the implied private cause of action analysis has been applied to suits brought against government officials. *See Alexander v. Sandoval*, 532 U.S. 275 (2001); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In those cases, the federal statute imposed identical duties on recipients of federal funds regardless of whether they were private persons or persons acting under color of law, so the Court's conclusion also decided whether the statute created an implied right of action against private defendants.

cause of action to enjoin implementation of pre-empted state laws runs only against persons acting under color of law. *See Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 58 (1st Cir. 2005) (collecting cases); 13D Wright & Miller, *supra* § 3566, at 292 n.70. It is this public-private distinction that has caused the Court consistently to hold that (1) federal courts possess federal-question jurisdiction over preemption claims brought by a private party against a person acting under color of law in his official capacity, *see Verizon*, 535 U.S. at 642; *Ex parte Young*, 209 U.S. at 145; but (2) federal courts do not possess federal-question jurisdiction over preemption claims brought by one private party against another, *see Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

Nor is this a case like *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011), another case against private defendants. There, plaintiffs were attempting to clothe an implied cause of action under the statute as a contract action. This Court rejected that effort because the contracts at issue "simply incorporate statutory obligations" and thus plaintiffs' suit to enforce the contracts against private parties was "in essence a suit to enforce the statute itself." 131 S. Ct. at 1343. By contrast, the "essence" of this suit is *not* to enforce Section 30(A), but to enforce the Supremacy Clause—which bars state officials from implementing any preempted state law.

Moreover, there is a particular irony in petitioners' heavy reliance on *Astra*. The defendants in *Astra* insisted that the contract cause of action was inappropriate because the contract simply incorporated the terms of a Spending Clause statute. Yet here, where respondents seek to enforce the preemptive effect of the federal law, petitioners claim that the federal law is merely a "State's contract with the federal government." Pet. Br. 47.

II. Congress In The Medicaid Act Did Not Preclude Reliance On The Existing Cause Of Action To Enforce The Supremacy Clause

A. Medicaid, Like Other Statutes Enacted Pursuant To The Spending Clause, Is Federal Law And Preempts Contrary State Law Pursuant To The Supremacy Clause

1. Petitioners suggest (Pet. Br. 46-49) that requirements in Spending Clause statutes should be subject to a different Supremacy Clause analysis. But it is settled that federal statutes enacted pursuant to the Spending Clause do preempt.

The cases are legion. For example, a State is preempted from interfering with a recipient's use of federal funds in the manner prescribed by Congress. *See, e.g., Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258, 269-270 (1985) (holding that state statute governing locality's use of funds "is invalid under the Supremacy Clause" as applied to

federal funds given to locality with intent of vesting it with discretion); *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curiam) (state statute allowing the State to attach Social Security benefits conflicted with the Social Security Act and was therefore preempted by operation of the Supremacy Clause); *Philpott v. Essex Cnty. Welfare Bd.*, 409 U.S. 413, 417 (1973) ("[b]y reason of the Supremacy Clause," funds derived from Social Security disability benefits are immune from state debt-collection processes even though in private hands). Thus, as the United States explains, "[t]he Act of Congress establishing the joint federal-state program * * * remains binding law with the full force and preemptive authority of federal legislation under the Supremacy Clause." U.S. Amicus Br. 27 n.11.

That preemptive authority applies equally when the State is the recipient of federal funds and disobeys the federal law governing the use of those funds. This Court has so held for more than 40 years. *See* Br. of *Dominguez* Resp. 21-22 n.10. The United States consistently has embraced these holdings. *See* U.S. Amicus Br., *Gonzaga Univ. v. Doe*, No. 01-679, at 18-19 (Feb. 2002); U.S. Br. in Opp., *Haveman v. Westside Mothers*, No. 02-277, at 6-10 (Oct. 2002); U.S. Amicus Br., *Lapides v. Board of Regents of Univ. of Ga. Sys.*, No. 01-298, at 13 (Dec. 2001).

If the Supremacy Clause did not apply in these situations, there would be no justification (in light of the Eleventh Amendment) for permitting suits in federal court against state officials. *See Pennhurst*

State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (Eleventh Amendment bars federal court from adjudicating suits for violations of state law against state officials when federal interest in vindicating Supremacy Clause is lacking). But this Court repeatedly has held that suits to enforce Spending Clause statutes against state officials who are recipients of federal financial assistance are not barred by the Eleventh Amendment. *See, e.g., Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) (Developmental Disabilities Act); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (Medicaid Act); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Aid to the Aged, Blind, and Disabled Act).

2. That Medicaid ultimately involves a State's "voluntary agreement" to participate in the federal program by accepting federal funds does not alter its status as supreme federal law.

Congress has created similar voluntary programs under its Commerce Clause authority, where it offers the State the power to regulate industries consistent with federal law or to abandon the field. *See New York v. United States*, 505 U.S. 144, 167 (1992); *see also FERC v. Mississippi*, 456 U.S. 742 (1982) (Public Utility Regulatory Policies Act of 1978); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act of 1977). This Court in *New York* explained that this type of Commerce Clause statute is the same as a Spending Clause statute because "the residents of the State retain the ultimate decision as to whether or

not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program." 505 U.S. at 168.

These conditional federal laws are not considered to be any less supreme over state law. *See Verizon*, 535 U.S. 635 (adjudicating preemption claims under the Telecommunications Act of 1996, which permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, 47 U.S.C. § 252(e)(5)). Yet if petitioners' theory about "voluntary" programs were correct, it would follow that these federal laws likewise were not supreme.

Furthermore, drawing a line between Spending Clause statutes and other statutes is not workable. Statutes are not always an exercise of a single power. For example, the federal Solomon Amendment required universities that received federal funds to permit access to military recruiters. While that unquestionably was an exercise of Congress's Spending Power, this Court sustained it as an exercise of Congress's War Power. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Likewise, a federal statute that prohibited state courts from admitting in civil trials documents

that local governments had created in order to receive certain federal funds was sustained as an exercise of Congress's Commerce Clause power. *See Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129 (2003).

B. In Medicaid, Congress Did Not Create Any Centralized Oversight Scheme That Displaced The Federal Courts' Authority To Enjoin Implementation Of Preempted State Laws

1. Petitioners posit (Pet. Br. 26-27) that Congress decided to "centralize" Medicaid enforcement in HHS. At least three times, however, this Court has addressed and rejected a similar argument.

In *Rosado v. Wyman*, addressing another provision of the Social Security Act, the Court explained that it had "considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of [Health, Education, and Welfare (HEW)] the power to cut off federal funds for noncompliance with statutory requirements." 397 U.S. 397, 420 (1970). In an action under Section 1983, moreover, this Court in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), again held that the Medicaid administrative oversight mechanism available here—review and approval of state-submitted plans, with withdrawal of funds for non-compliance—did not "evidence[ ] an intent to foreclose a private remedy in the federal courts." *Id.* at 523.

Most recently in *Stewart*, involving another Spending Clause statute, this Court held:

> The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has "displayed an intent not to provide the 'more complete and more immediate relief' that would otherwise be available under *Ex parte Young*."

131 S. Ct. at 1639 (quoting *Verizon*, 535 U.S. at 647 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 75 (1996))).

2. Although this Court in *Gonzaga* relied on the notion of "centralized review" as a ground not to find an enforceable "right," it did so based on a special statutory provision that prohibited the agency from carrying out the enforcement "in any of the regional offices." 536 U.S. at 290 (quoting 20 U.S.C. § 1232g(g)). This Court reasoned that the same Congress that added the centralization provision "due to 'concern that regionalizing the enforcement of [the statute] may lead to multiple interpretations of it'" would not have "intended private suits to be brought before thousands of federal- and state-court judges." *Ibid.*

Medicaid has no such provision. To the contrary, HHS delegates authority to approve plans and plan amendments to its regional offices. *See* 42 C.F.R. § 430.15(b). Those offices are not in fact uniform in

their practices or interpretations. *See* United States Government Accountability Office, *Medicaid Managed Care: CMS's Oversight of States' Rate Setting Needs Improvement*, GAO-10-810 (2010). Furthermore, petitioners' argument cannot be reconciled with their acknowledgements that many parts of Medicaid can be privately enforced. Pet. Br. 42-43, 46-47 n.17. A statute that intended only centralized enforcement would not permit any such suits.

Petitioners note that the Medicaid regulations contemplate that private persons or entities may participate as amicus or parties in administrative hearings. Pet. Br. 7-8. But an administrative hearing can only be triggered if HHS *disapproves* a state plan amendment or *disallows* particular state spending and then the State subsequently challenges HHS's action. Thus, if the regional office approves a state plan amendment (or simply does not act within the 90-day period, *see* 42 U.S.C. § 1396n(f)(2)), there is no hearing in which to participate.

Even in those small subset of cases in which HHS disapproves a state plan amendment and there is an administrative hearing, the regulations allow participation by private persons or entities as parties only "if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute." 42 C.F.R. § 430.76(b). Petitioners, of course, claim (Pet. Br. 52 & n.20) that both providers and beneficiaries fall outside this regulation. Thus, despite their pointing to the regulations,

petitioners would offer respondents no forum where they would have an opportunity to be heard or to appeal to court.

And nothing in the statute or regulations permits private parties to trigger an administrative hearing. Thus, this case has none of the statutory protections that this Court found material in *Astra*, where federal law required HHS to develop a "formal dispute resolution procedure," ultimately resulting in federal court review under the APA, to resolve claims by entities that provide medical care for the poor. 131 S. Ct. at 1350.

3. Furthermore, apart from the barriers to private participation, HHS itself does not have effective tools to address rate cuts or other reduction in services. HHS's primary enforcement mechanism is the threat that it will not pay the federal matching share for state spending that does not comply with the Act. That threat has some efficacy when the State's violation is paying too much to providers (or providing services falling outside the scope of Medicaid). HHS simply does not pay the difference between the lower rate the State should have paid and the higher rate it did pay (or HHS refuses to pay for uncovered services). But when, as here, the State *cuts* the rates it pays to providers, there are no discrete payments for HHS to withhold; HHS instead would have to threaten to withdraw federal funding for the State's entire Medicaid program, which has never occurred.

HHS thus possesses no means of ensuring that States will not illegally cut rates. These cases are perfect examples of HHS's impotence. Petitioners implemented the proposed rate cuts months before they even submitted them to HHS for approval. And despite that HHS *disapproved* the cuts (almost two years after they were submitted), petitioners still are paying the disapproved rates except where federal courts have enjoined them from doing so.

A similar situation recently has arisen in Indiana, where the State enacted a law disqualifying a particular provider from receiving Medicaid payments. *See Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, No. 1:11-CV-630, 2011 WL 2532921 (S.D. Ind. June 24, 2011). HHS disapproved the State's plan amendment, *id.* at *10, but the State indicated its intention to enforce the disqualification anyway. HHS's only response was to file an *amicus* brief supporting the provider's private federal suit. Absent a court injunction, Medicaid beneficiaries would have been denied access to certain medical services and the providers would have suffered substantial monetary damages (resulting in lay-offs of employees and closing health centers statewide). *Id.* at *17. There is no evidence that Congress intended such a provider to have no access to federal court in that situation. As the United States itself explained at the certiorari stage, a "system that relies solely on agency review may often be less effective in ensuring the supremacy of federal

law than a system of agency review supplemented by private enforcement." U.S. Cert. Amicus Br. 19.

4. Two other statutes amending Medicaid also reflect Congress's intent that providers should be able to enforce Medicaid provisions, and not just through Section 1983.

First, Congress amended the Medicaid Act in 1975 to provide that any State that did not waive its Eleventh Amendment immunity for "any suit brought against the State or a State officer by or on behalf of any provider of services * * * with respect to the application of [Section 13(D), requiring reasonable rates of reimbursement]" would lose 10% of its Medicaid funds. Pub. L. No. 94-182, § 111(a), 89 Stat. 1051, 1054 (1975).

That amendment appears to respond, in part, to the holding of *Edelman v. Jordan*, 415 U.S. 651 (1974). *Edelman* held that the Eleventh Amendment barred federal courts from awarding retroactive money damages for violations of federal welfare law. Congress enacted the waiver condition because States were "chang[ing] their reimbursement system without receiving HEW approval" and "providers feared that HEW would be slow to determine if State action was legal, and to bring a conformity hearing to cut off Federal funds if they did find the State out of compliance." H.R. Rep. No. 94-1122, at 4 (1976). Congress was concerned that, in the interim, the "State-devised changes in hospital reimbursement would result in a loss of funds" to providers. *Ibid.* The legislative

history noted that although "the providers could sue the State to enjoin action," no retroactive relief would be available absent the waiver. *Ibid.*

Congress repealed this waiver provision in 1976. Pub. L. No. 94-552, 90 Stat. 2540 (1976). The legislative history made clear, however, that Congress did not intend that repeal to "be construed as in any way contravening or constraining the rights of the providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive [relief] in a federal or state judicial forum." S. Rep. No. 94-1240, at 4 (1976). Likewise, HEW stated that "providers can continue, of course, to institute suit for injunctive relief in State or Federal courts, as necessary." H.R. Rep. No. 94-1122, at 7. As this Court concluded, this provision shows that "Congress intended that health care providers be able to sue in federal court for injunctive relief." *Wilder*, 496 U.S. at 516.

Notably, Congress did not limit the waiver, while it was in effect, to Section 1983 suits, but applied it to "any suit." That is relevant because at the time Congress enacted and then repealed this statute, it was not clear whether Section 1983 could be used to enforce rights secured by Medicaid. Although *Edelman* was later characterized in *Maine v. Thiboutot*, 448 U.S. 1 (1980), as a suit under Section 1983, this Court had at the time left open the question what statutes could be enforced through Section 1983, *see Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974), and

lower courts and commentators were divided, *see Thiboutot*, 448 U.S. at 29-30 (Powell, J., dissenting).

Two other statutes likewise contemplate that private suits to ensure compliance with Medicaid are not limited to Section 1983. In response to *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress enacted two provisions in 1994 that stated that Medicaid and other provisions of the Social Security Act were not "unenforceable" by private parties simply because the provisions sought to be enforced were identified as components of a state plan. In doing so, Congress again referred expansively to "private actions" brought "to enforce a provision" of the Social Security Act, rather than merely to Section 1983. Pub. L. No. 103-382, § 555, 108 Stat. 3518, 4057 (1994) (codified at 42 U.S.C. § 1320a-2); Pub. L. No. 103-432, § 211, 108 Stat. 4398, 4460 (1994) (codified at 42 U.S.C. § 1320a-10).

C. Congress Did Not Preclude Private Enforcement Of Section 30(A)'s Preemptive Effect

Petitioners seek to characterize Section 30(A) as so amorphous that it has no content to which the Supremacy Clause can attach. Pet. Br. 26, 29-30. But this Court did not grant petitioners' second question presented, which sought review of the meaning of Section 30(A). Given that denial of review, the only question before the Court is whether medical providers and beneficiaries can obtain an injunction to enjoin enforcement of a state law that

conflicts with Section 30(A). In any event, Section 30(A) has substantive content that is well within the judicial ken, and Congress expected private litigation over compliance with Section 30(A).

1. Section 30(A) contains judicially enforceable standards that preempt contrary state laws

Congress first enacted Section 30(A) in 1968. At that time, as petitioners note (Pet. Br. 29-30), it apparently was intended solely as a ceiling on payments. That is, it required state plans to provide for methods and procedures necessary to ensure that "payments * * * are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." Pub. L. No. 90-248, § 237, 81 Stat. 821, 911 (1968).

In 1981, however, Congress removed the "in excess of reasonable charges" language from 30(A), so that the provision required that state plans provide for methods and procedures necessary to ensure that "payments are consistent with efficiency, economy, and quality of care." Pub. L. No. 97-35, § 2174(a), 95 Stat. 357, 809 (1981). The legislative history accompanying the 1981 act indicates that Congress intended the federal courts to be open to suits by beneficiaries or providers:

> The Committee wishes to emphasize that States must continue to operate their programs in conformity with approved State plans. Plan changes that would affect the

> rights of Medicaid beneficiaries or participating providers would be subject to approval of the Secretary, who must confirm that the State's program will continue to be operated in a lawful manner. *Of course, in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action.*

H.R. Rep. No. 97-158, Vol. II, at 301 (1981) (emphasis added).

When Congress next amended Section 30(A) in 1989, it did so to add the requirement that state plans provide for methods and procedures necessary to ensure that payments "are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260 (1989). In the public law, Congress entitled this amendment: "Codification of adequate payment level provisions." *Ibid.*

The legislative history confirms that Congress added this requirement (which previously existed as an agency regulation) due to concern that beneficiaries were not receiving covered services because physician participation in the Medicaid programs was too low, particularly with respect to obstetricians. H.R. Rep. No. 101-247, at 389-390 (1989). Congress attributed that low participation rate, in turn, to States' failure to maintain adequate provider reimbursement

levels. *Ibid.* In particular, Congress understood that Medicaid expansions also included in the Act "will not have their intended effect if physicians are not willing to treat Medicaid patients." *Id.* at 390. And Congress explained that, "without adequate payment levels, it is simply unrealistic to expect physicians to participate in the program." *Ibid.*

Not surprisingly, then, petitioners conceded in their petitions and in other litigation that Section 30(A) imposes a substantive standard regarding the level of payments. 09-958 Pet. 26, 33 (Section 30(A) "sets some substantive objecti[ves]," including that the rates cannot be so low "as to create an access or quality of care problem for beneficiaries"); 09-1158 Pet. 31; *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1498 (9th Cir. 1997) ("the Department admitted that the access requirement serves to mandate a minimum payment standard"), cert. denied, 522 U.S. 1044 (1998).

HHS likewise has viewed Section 30(A) as capable of application. It has relied on Section 30(A) to disapprove proposed state rate decreases. *See, e.g.*, 57 Fed. Reg. 917, 918 (Jan. 9, 1992) (disapproving proposed state rate cut because HHS "believes that a forty percent reduction in the State's payment level for physician services would not meet the statutory requirements of section 1902(A)(30) of the Act"). Indeed, every court that addressed the issue prior to *Gonzaga* expressly found Section 30(A) capable of judicial enforcement. *See, e.g., Orthopaedic,* 103 F.3d at 1495-1496; *Visiting Nurse Ass'n of N. Shore, Inc. v.*

Bullen, 93 F.3d 997, 1004 (1st Cir. 1996), cert. denied, 519 U.S. 1114 (1997); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1028-1029 (7th Cir. 1996); *Arkansas Med. Soc'y Inc. v. Reynolds*, 6 F.3d 519, 523-528 (8th Cir. 1993).

2. *Congress intentionally preserved private enforcement of Section 30(A) even while eliminating the Boren Amendment*

Petitioners point (Pet. Br. 31-33) to Congress's decision in 1997 to repeal the Medicaid Act's Boren Amendment, as well as one sentence in an associated committee report (Pet. Br. 32), to argue that Congress did not want Section 30(A) privately enforced by providers. Of course, the question here is not private enforcement of Section 30(A) alone, but of its preemptive effect through the Supremacy Clause. In any event, petitioners' argument fails on its own terms.

Before 1997, this Court had held in *Wilder* that a different provision of the Medicaid Act, known as the Boren Amendment, could be enforced through Section 1983. At that time, the lower courts were in agreement that Section 30(A) also was privately enforceable through Section 1983. *See*, *supra*, pages 56-57.

In 1997, the National Governors Association urged Congress to repeal both the Boren Amendment and "Boren-like language [in the Medicaid Act] that has exposed states to lawsuits driving up rates for services." *Governors' Perspective on Medicaid*: Hearing Before the S. Comm. on Finance, 105th Cong. 44

(1997). In describing the "Boren-like" provisions, the Governors specifically cited Section 30(A) as one of those provisions, and discussed the then-recent decision in the *Orthopaedic* case out of California. *Ibid.* While Congress did repeal the Boren Amendment, it did not adopt that broader recommendation. Thus, petitioners' reliance on a snippet from a 1997 committee report that described the repeal of the Boren Amendment as precluding enforcement by providers of "any other" provision of Section 1396a, H.R. Rep. No. 105-149, at 591 (1997), does not alter the fact that the text of Section 30(A) was not amended in 1997.[6]

Moreover, other contemporaneous efforts to limit private enforcement of Medicaid also failed. Congress declined to enact proposed bills, reported out of the relevant House and Senate committees in 1996, that expressly would have barred all beneficiary or provider lawsuits in federal court. *See, e.g.*, H.R. Rep. No. 104-651, at 356 (1996) (discussing H.R. 3734, 104th Cong. § 1508(a) (1996), which would have provided that, except for actions by HHS, "no person or entity may bring an action against a State in Federal court based on its failure to comply with any requirement of this title"); S. 1956, 104th Cong.

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[6] Nor did Congress eliminate federal district court jurisdiction over claims involving Medicaid, as it did in the Johnson Act, the Tax Injunction Act, and portions of the Medicare Act, *see Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000); 42 U.S.C. § 1395ww(d)(7).

§ 1508 (1996) (same). And the President vetoed a bill that would have converted Medicaid into a block-grant program and would have abrogated any pending cause of action "which seeks to require a State to establish or maintain minimum payment rates under [Medicaid] or claim which seeks reimbursement for any period before the date of the enactment of this Act based on the alleged failure of the State to comply with [Medicaid]." H.R. 2491, 104th Cong. § 7002(b)(4) (1995); *see also* H.R. Rep. No. 104-350, at 1069 (1995) (Conf. Rep.) ("The bill would remove the existing right for an applicant, beneficiary, provider or health plan to sue a State official under 42 U.S.C. §1983 to require prospective enforcement of the Medicaid statute.").

III. Petitioners' Invocation Of Prudential Standing Is Misplaced And Waived

At the end of their brief, petitioners for the first time suggest that this Court should address questions of "prudential standing." Pet. Br. 49-52. That belated suggestion is both waived and without merit.

A. The claim that respondents lack prudential standing to pursue these actions does not implicate the Court's subject-matter jurisdiction and thus is waivable. *See Craig v. Boren*, 429 U.S. 190, 193-194 (1976). Petitioners waived that argument in these cases by not pressing it in either the court of appeals or in their certiorari petitions.

In neither appeal did petitioners press a zone-of-interests analysis in the court of appeals. In No. 09-958, the court of appeals expressly determined in the

first appeal that petitioners had waived the question of prudential standing by "failing to articulate any argument challenging [respondents'] prudential standing." 09-958 Pet. App. 90a n.17. In the appeal following remand, petitioners accepted that they had waived the issue in the first appeal. 09-55692 Pet. C.A. Br. 32-33. In *California Pharmacists* litigation at issue in No. 09-1158, petitioners did not raise prudential standing in the court of appeals in their "Statement of the Issues," and simply dropped a footnote asserting that respondents lacked prudential standing because they "have no rights under the federal law they seek to enforce." 09-55532 Pet. C.A. Br. 22-23 n.10.

And, as petitioners admit (Pet. Br. 52 n.20), in neither case did they argue that the respondent beneficiaries (as opposed to providers) were not within the zone of interests.

In this Court, standing is not mentioned in any of the three petitions, three reply briefs, and two supplemental briefs filed by petitioners filed at the certiorari stage. The focus of those filings was the existence of a cause of action, not justiciability doctrines such as prudential standing. "[T]he question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute." *Bond*, 131 S. Ct. at 2362.

B. In any event, respondents possess prudential standing. They are not seeking to enforce the rights of the United States, nor of the public at large.

Instead, they seek to enforce the Supremacy Clause. That Clause (like other federalism provisions governing the relationship between the National Government and the States) was intended to protect individuals by preventing one sovereign from encroachment into its proper scope of authority. *See McCulloch v. Maryland*, 17 U.S. 316, 427-432 (1819); *Golden State*, 493 U.S. at 455 (Kennedy, J., dissenting) (describing the Supremacy Clause's "protection of the federal structure").

Just as a person has prudential standing to argue that "[t]he public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government," *Bond*, 131 S. Ct. at 2366, a person has prudential standing to argue that a law enacted by a State has been displaced by the National Government. In both circumstances, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* at 2364.

Further, to the extent relevant, Section 30(A) itself was enacted to ensure that beneficiaries received medical services by creating sufficient incentives for doctors to provide services to Medicaid patients. *See, supra*, pages 55-56. As beneficiaries of medical services and the providers of those services, both have a direct interest in how much the providers are paid. Indeed, the facts of these cases show that the rate cuts would have a significant and immediate

detrimental impact on both beneficiaries and providers. *See, supra*, pages 8-13. Both certainly have interests "arguably [sought] to be protected by the statutes." *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (quoting *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

Taken to its logical conclusion, petitioners apparently believe that neither providers nor beneficiaries could challenge any HHS regulations to implement Section 30(A) under the Administrative Procedure Act because they do not fall within the zone of interests. That view—that respondents cannot be parties in HHS administrative hearings and cannot appeal adverse HHS decisions or regulations—would be a nightmare for those who rely on Medicaid to provide a medical safety net.

CONCLUSION

For the reasons set forth above, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

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